1 STUART C. CLARK (SBN 124152)
   clark@carrferrell.com
2 CHRISTINE S. WATSON (SBN 218006)
   cwatson@carrferrell.com
3 CARR & FERRELL *LLP*
   2200 Geng Road
4 Palo Alto, California 94303
   Telephone: (650) 812-3400
5 Facsimile: (650) 812-3444

6 Attorneys for Plaintiff
   I. MICHAEL ROSS
7

8   UNITED STATES DISTRICT COURT

9   NORTHERN DISTRICT OF CALIFORNIA

10   SAN FRANCISCO DIVISION

11

12 I. MICHAEL ROSS,   CASE NO. C08-01052 MHP

13   Plaintiff,

                                              FIRST AMENDED
14   v.   **COMPLAINT FOR**
                                              COPYRIGHT INFRINGEMENT
15 TOMLAB OPTIMIZATION AB,   **AND UNFAIR COMPETITION**
    TOMLAB OPTIMIZATION, INC.,
16 and DOES 1 through 20,

17   Defendant.

18

19   **INTRODUCTION**

20   1.   Plaintiff I. Michael Ross ("Ross") seeks by this action for copyright infringement to

21 recover compensatory damages and infringement profits, and punitive or otherwise enhanced

22 damages, together with injunctive relief and other appropriate relief, from defendants Tomlab

23 Optimization AB ("Tomlab Sweden") and Tomlab Optimization, Inc. ("Tomlab USA"). Ross also

24 seeks injunctive relief on his claim for unfair competition. The grounds for the action are that

25 Tomlab Sweden and Tomlab USA (hereinafter jointly referred to as the "Tomlab Defendants") are

26 distributing and have in the past distributed software products that include copyrighted content

27 owned by Ross. Notwithstanding demand, the Tomlab Defendants have failed and/or refused to

28 cease their infringing conduct, thereby necessitating these proceedings.

JURISDICTION

2.   This is an action for copyright infringement under the Copyright Act, 17 U.S.C. section 501, and for unfair competition under California Business and Professions Code section 17200, et seq. This court has jurisdiction under 28 U.S.C. sections 1338(a) and 1367(a).

VENUE

3.   Venue is proper in this court pursuant to 28 U.S.C. section 1391(b) and (d), in that a substantial part of the events giving rise to the claim occurred in this district, and Tomlab Sweden is an alien. The events upon which venue is based include, but are not limited to, the sale by the Tomlab Defendants of at least one copy of the infringing product in this district, namely in Monterey County.

INTRADISTRICT ASSIGNMENT

4.   For the purposes of Civil Local Rule 3-2(c) and (d), this action is required to be assigned to the San Jose Division of this District, by virtue of the facts alleged in paragraph 3, above.

PARTIES

5.   Plaintiff I. Michael Ross is an individual residing in Monterey County, California.

6.   Defendant Tomlab Optimization AB is, according to information and belief, a corporation incorporated in Sweden which has its principal place of business in the United States in the State of Washington.

7.   Defendant Tomlab Optimization, Inc. is, according to information and belief, a corporation incorporated in Delaware which has its principal place of business in the United States in the State of Washington.

GENERAL ALLEGATIONS

8.   During or about 2001, Ross authored a software program which he named DIDO. This software program was and is capable of being used to solve optimal control problems, and has wide application in branches of engineering that involve automation, for example for use in autonomously flying a spacecraft.

1   9.   On February 4, 2008 Ross obtained U.S. Copyright Registration No. TXu 1-571-354

2 for the DIDO software program, and a copy of the registration certificate is attached as Exhibit "A."

3   10.   On information and belief, non party Anil Rao ("Rao") obtained access to the DIDO

4 software program, without the knowledge or consent of Ross, and copied part or all of the DIDO

5 software program. Rao thereupon commenced distributing that copied version of the software

6 under the DIDO name. Like the original Ross program named DIDO, Rao's derivative version of

7 DIDO was and is also capable of use to solve optimal control problems.

8   11.   On information and belief:

9 (a)   Rao subsequently developed a software program under the name of DTOP; and,

10 (b)   Rao incorporated copied code and/or expression from Ross' original DIDO program

11   in DTOP; and,

12 (c)   Rao thereafter developed yet another software program under the name of GPOCS;

13   and,

14 (d)   Rao also incorporated copied code and/or expression from Ross' original DIDO

15   program in GPOCS; and,

16 (e)   DTOP and GPOCS are also capable of use in solving optimal control problems.

17   12.   The Tomlab Defendants are distributors on behalf of Rao of the GPOCS software

18 program. That program is, among other things, advertised for sale on the Tomlab Defendants'

19 website http://tomopt.com as "Tomlab/GPOCS."

20   13.   The Tomlab Defendants have, among other things, sold the GPOCS software

21 program in this district, including but not limited to at least one sale in the County of Monterey.

22
                                    FIRST CAUSE OF ACTION
23   (Copyright Infringement)

24   14.   Ross realleges and incorporates by reference paragraphs 1 though 13, above.

25   15.   Ross invested substantial time, skill and resources into the writing of the DIDO

26 software program, to which Ross owns exclusive rights. That program embodies original

27 expression which constitutes copyrightable subject matter protectable under the Federal Copyright

28 Act.

16. Since GPOCS incorporates, on information and belief, actual code and/or non-literal expression copied and/or derived from the original Ross DIDO program, the Tomlab Defendants' conduct in selling GPOCS constitutes the infringement by the Tomlab Defendants of exclusive rights of Ross in the original DIDO program which are protected by section 106 of the Copyright Act. Such infringed exclusive rights include the right to reproduce the copyrighted work, and the right to prepare derivative works based on the copyrighted work, and the right to distribute the copyrighted work.

17. As a consequence of the Tomlab Defendants' conduct, Ross has already suffered damages and other irreparable injury, and he will continue to do so unless the Tomlab Defendants are enjoined. Ross is accordingly entitled to monetary damages and the forfeiture of the Tomlab Defendants' infringer's profits, or alternatively to statutory damages. Ross is also entitled to injunctive relief.

18. Notwithstanding demand, the Tomlab Defendants have failed and/or refused to cease and desist from selling GPOCS. On information and belief, the Tomlab Defendants have also failed and/or refused to conduct any reasonable investigation to determine whether or not GPOCS infringes the exclusive copyright rights of Ross, and the Tomlab Defendants have continued to sell GPOCS with reckless disregard for whether or not GPOCS infringes Ross' copyright.

19. By virtue of the circumstances described in the preceding paragraph, the Tomlab Defendants' infringement is willful, and Ross is entitled to punitive damages in an amount according to proof, or alternatively to enhanced statutory damages.

WHEREFORE Ross prays for judgment as set out in the Prayer, below.

SECOND CAUSE OF ACTION
(Unfair Business Practices – California Business &Professions Code § 17200)

20. Ross realleges and incorporates by reference paragraphs 1 though 19, above.

21. Prior to on or about August, 2007 the Tomlab Defendants were the distributors of Ross' DIDO product. During or about August, 2007, the Tomlab Defendants ceased distributing the DIDO software product. Shortly prior to ceasing to distribute the DIDO software, the Tomlab Defendants had commenced distributing the GPOCS software product.

First Amended Complaint for Copyright Infringement and Unfair Competition
(Case No. C08-01052 MHP)

22.   The GPOCS software product competes in the marketplace with the DIDO software

product, which Ross now distributes and sells other than through the Tomlab Defendants.

23.   By virtue of the facts alleged in the preceding paragraph and in paragraphs 15

through 19, above, the Tomlab Defendants are using a product that infringes Ross' copyright to

compete with Ross' DIDO software product. In so doing the Tomlab Defendants have caused

injury and damage to Ross, including lost revenues and profits.

24.   The Tomlab Defendants' conduct described in the preceding paragraph is unlawful

and/or unfair and/or fraudulent under section 17200 et seq. of the Business and Professions Code,

and Ross is therefore entitled to relief under that statute.

25.   Unless enjoined, the Tomlab Defendants will continue to cause irreparable injury

and damage to Ross by distributing and/or selling the GPOCS software product.

WHEREFORE, Ross prays for judgment as set out in the Prayer, below.

PRAYER

WHEREFORE, Ross prays for judgment as follows:

1.   On the First Cause of Action for Copyright Infringement, for compensatory damages

according to proof, and any infringer's profits of the Tomlab Defendants attributable

to the infringement;

2.   On the First Cause of Action for Copyright Infringement, for punitive damages

according to proof;

3.   Alternatively to (1) and (2), above, for statutory damages, including enhanced

damages under 17 U.S.C. section 504(c)(2) based on the Tomlab Defendants' willful

conduct;

4.   On the First and Second Causes of Action for Copyright Infringement and Unfair

Competition, for a permanent injunction;

5.   For costs and attorney's fees under 17 U.S.C. section 505; and

6.   For such further or alternative relief as may be appropriate.

First Amended Complaint for Copyright Infringement and Unfair Competition
(Case No. C08-01052 MHP)

1   Dated: March 19, 2008   CARR & FERRELL *LLP*

2

3   By: /s/ Stuart C. Clark
                                             STUART C. CLARK
4   CHRISTINE S. WATSON

5   Attorneys for Plaintiff
                                             I. MICHAEL ROSS

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First Amended Complaint for Copyright Infringement and Unfair Competition
(Case No. C08-01052 MHP)

1   **DEMAND FOR JURY TRIAL**

2

3   Plaintiff I. Michael Ross hereby demands a jury trial of all issues in the above-captioned

4   action which are triable to a jury.

5

6   Dated: March 19, 2008   CARR & FERRELL *LLP*

7

8   By: /s/ Stuart C. Clark
                                              STUART C. CLARK
9   CHRISTINE S. WATSON

10   Attorneys for Plaintiff
                                              I. MICHAEL ROSS

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First Amended Complaint for Copyright Infringement and Unfair Competition
(Case No. C08-01052 MHP)

Certificate of Registration

This Certificate issued under the seal of the Copyright
Office in accordance with title 17, *United States Code,*
attests that registration has been made for the work
identified below. The information on this certificate has
been made a part of the Copyright Office records.

Marybeth Peters

Register of Copyrights, United States of America

Registration Number:

TXu 1-571-354

**Effective date of
registration:**

February 4, 2008

Title

Title of Work: DIDO

Completion/Publication

Year of Completion: 2001

Author

▪ Author:	Isaac Michael Ross
Author Created:	Computer program
Work made for hire:	No
Domiciled in:	United States
Anonymous:	No

Pseudonymous: No

▪ Author:	Fariba Fahroo
Author Created:	Computer program
Work made for hire:	No
Domiciled in:	United States
Anonymous:	No

Pseudonymous: No

Copyright claimant

Copyright Claimant: Isaac Michael Ross

56 Skyline Crest, Monterey, CA, 93940

Transfer Statement: By written agreement

Limitation of copyright claim

Material excluded from this claim: The work is not based on and does not incorporate any preexisting work,
except that snippets of computer program code by William Gragg are
incorporated

Previously registered: No

EXHIBIT _____ A

Page 1 of 2

IPN#:

Registration #:   TXU001571354

Service Request #:   1-41750867

Carr & Ferrell LLP
Jefferson F. Scher
2200 Geng Road
Palo Alto, CA 94303